

FILED  
U.S. DISTRICT COURT  
DISTRICT OF COLORADO

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

GREGORY C. LANGHAM  
CLERK

Civil Action No. **04-N-1031 (MJW)**

BY \_\_\_\_\_ DEP. CLK

UNITED STATES OF AMERICA,

Plaintiff,

v.

THE CITY AND COUNTY OF  
DENVER, WASTE MANAGEMENT OF  
COLORADO, INC., and  
CHEMICAL WASTE MANAGEMENT,  
INC.,

Defendants.

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**CONSENT DECREE**

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## I. BACKGROUND

1. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a Complaint in this matter pursuant to Section 106(b)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9606(b)(1), as amended.

2. The United States, among other things, alleges in its Complaint that Settling Defendants violated certain requirements of Administrative Order for Remedial Design/Remedial Action ("RD/RA"), EPA Docket No. CERCLA VIII-95-05 ("UAO"), relative to their implementation of the Landfill Gas ("LFG") Remedy at the Lowry Landfill Superfund Site, located in Arapahoe County, Colorado (the "Site"). The alleged violations include, among others: a) exceedances of subsurface soil gas performance standards; b) failure to timely submit such reports as required under the UAO; and c) failure to promptly mitigate exceedances. Settling Defendants responded promptly to EPA's March 4, 1999 Notice of Violation ("NOV").

3. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on September 21, 1984, 49 Fed. Reg. 37070, 37083.

4. EPA's decision regarding the remedial action to be implemented at the Site is embodied in a Record of Decision ("ROD") dated March 10, 1994, an Explanation of Significant Differences ("ESD") dated August 1995, and a Second ESD dated October 1997. The Settling Defendants have objected to several remedial decisions in the ROD and in the ESDs as well as to EPA's implementation of these decision documents.

5. To implement the remedial action selected in the ROD and subsequent ESDs, EPA issued the UAO to a number of Potentially Responsible Parties ("PRPs") at the Site on November 18, 1994. Settling Defendants are performing the RD/RA on behalf of themselves and a number of other respondents to the UAO. The Settling Defendants, as of April 30, 2004, are, based on information available to EPA as of that date, in substantial compliance with the UAO.

6. The United States has filed a Complaint in United States District Court, District of Colorado against the Defendants, among others, pursuant to Section 107(a) of CERCLA, 42 U.S.C. Section 9607(a), captioned *United States of America v. City and County of Denver, et al.*, Civil Action No. 02-N-1341. The Complaint seeks the recovery of response costs allegedly incurred and to be incurred by the United States relating to the Site. The Defendants have asserted affirmative defenses and counterclaims against the United States in this action seeking a determination that certain remedial decisions in the ROD, ESDs, and the UAO, are arbitrary and capricious and otherwise inconsistent with the law.

7. Under a proposed settlement, Settling Defendants were to have paved a haul road at the Denver-Arapahoe Disposal Site as a Supplemental Environmental Project. The road was paved prior to the finalization of the settlement. The parties were unable to finalize the settlement due to a dispute with respect to the implementation of this paving project. While no confirmatory studies have been conducted, Settling Defendants contend that a partial paving of a haul road at the Site during settlement discussions was environmentally beneficial in that it reduced the amount of particulate matter generated from traffic on that road.

8. Settling Defendants do not admit and expressly deny any liability to Plaintiff arising out of the transactions or occurrences alleged in the Complaint. Nothing in this Consent Decree shall be construed to constitute an admission by any Party.

9. Defendants contend that little or no penalty is appropriate for the alleged violations because there was no immediate threat to human health and the alleged exceedances were promptly mitigated. Settling Defendants further contend that little or no penalty is appropriate for the alleged violations because EPA has relaxed the performance standards since the alleged violations occurred; under these new performance standards, almost none of the conditions that led to the alleged exceedances would be violations today. Defendants nonetheless installed and operated a soil-vapor extraction system and treated the subsurface gas to below the former performance standards. In addition, Defendants further contend the routine monitoring data that was allegedly submitted late was collected by the Defendants in a timely fashion and submitted in a timely fashion before EPA made any request or demand for the data. The United States contends that a penalty is appropriate, and that performance standards identified in the ROD as well as those subsequently modified by EPA are not inconsistent with the National Contingency Plan, 40 C.F.R. Part 300 ("NCP"), and are enforceable.

10. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

**THEREFORE**, with the consent of the Parties to this Decree, it is **ORDERED**,  
**ADJUDGED, AND DECREED:**

## **II. JURISDICTION**

11. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606(b) and 9613(b). This Court also has personal jurisdiction over Settling Defendants. Solely for the purposes of this Consent Decree and the underlying Complaint, Settling Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. Further, Settling Defendants shall not challenge the entry of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

## **III. PARTIES BOUND**

12. This Consent Decree is binding upon the United States and upon Settling Defendants and their successors and assigns. Any change in ownership or corporate or other legal status, including but not limited to any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of Settling Defendants under this Consent Decree.

## **IV. DEFINITIONS**

13. Unless otherwise expressly provided herein, terms used in this Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree, the following definitions shall apply:

- a. "CERCLA" shall mean the Comprehensive Environmental Response,

Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 -9675;

- b. **"Consent Decree"** shall mean this Consent Decree;
- c. **"Day"** shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or Federal Holiday, the period shall run until the close of business of the next working day;
- d. **"Effective Date"** shall mean the day upon which this Consent Decree is approved by the Court.
- e. **"EPA"** shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States;
- f. **"Interest"** shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26 of the U.S. Code, in accordance with 42 U.S.C. § 9607(a), compounded on an annual basis;
- g. **"Notice Of Violations" or "NOV"** shall mean the March 4, 1999, Notice of Violations of Unilateral Administrative Order for Remedial Design/Remedial Action, EPA Docket No. CERCLA VIII-95-05, Lowry Landfill Superfund Site, Arapahoe County, Colorado;
- h. **"Paragraph"** shall mean a portion of this Consent Decree identified by an arabic numeral;
- i. **"Parties"** shall mean the United States and Settling Defendants;
- j. **"Settling Defendants or Defendants"** shall mean the City and County of Denver, Waste Management of Colorado, Inc., and Chemical Waste Management, Inc.;
- k. **"United States"** shall mean the United States of America, including the United States Environmental Protection Agency.

#### V. TERMS OF SETTLEMENT

14. In settlement of the United States' claim for civil penalties pursuant to Section 106(b)(1) of CERCLA, 42 U.S.C. § 9606(b)(1), for the alleged violations listed in the Notice of Violations and described in the Complaint, Settling Defendants shall jointly pay to the United

States a civil penalty of \$265,000.00 pursuant to the requirements of Section VI of this Consent Decree (Payment of Civil Penalty). Neither Plaintiff nor Settling Defendants shall cite to or otherwise refer in any way to this Consent Decree, or to the alleged violations referred to therein, in *United States v. City and County of Denver, et al.*, Civ. No. 02-N-1341 (D. Colo. filed July 15, 2002).

#### **VI. PAYMENT OF CIVIL PENALTY**

15. Within thirty (30) days of the Effective Date of this Consent Decree, Settling Defendants shall pay two hundred and sixty-five thousand dollars (\$265,000.00) to the United States by Fed Wire Electronic Funds Transfer ("EFT") to the EPA Hazardous Substance Superfund in accordance with current EFT procedures, referencing the name of the Settling Defendants, the Site name (Lowry Landfill Site), USAO File Number 2003V00191, EPA-Region VIII, Site/Spill ID # 08-08, and DOJ case number 90-11-3-06703. Payments shall be made in accordance with instructions provided to Settling Defendants by the Financial Litigation Unit of the U.S. Attorney's Office in the District of Colorado following lodging of the Consent Decree. Any payment received after 4:00 p.m. Eastern Time shall be credited on the next business day.

16. At the time of any payment under Paragraphs 15 or 19, Settling Defendants shall send notice that payment has been made to the EPA Regional Financial Management Officer and DOJ in accordance with Section X (Notices and Submissions).

17. Civil penalty payments pursuant to this Consent Decree are penalties within the meaning of section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21, and are not tax deductible expenditures for purposes of federal law.



## **VII. INTEREST ON LATE PAYMENTS AND STIPULATED PENALTIES**

### **Interest on Late Payments.**

18. In the event that any payments required under Paragraph 15 or 19 of this Consent Decree are not received by or on the due date, Interest shall begin to accrue on the unpaid balance from the due date through the date payment is received at the EPA Hazardous Substance Superfund.

### **Stipulated Penalties.**

19. If any amounts due to the United States under this Consent Decree are not received by the due date, the United States may require Settling Defendants to jointly pay a stipulated penalty, in addition to the Interest required by Paragraph 18, of \$2,000 per day that such payment is late.

- a. Stipulated penalties shall begin to accrue on the day after payment is due, and shall continue to accrue through the day final and full payment is made. Penalties shall accrue regardless of whether EPA has notified Settling Defendants of the violation or made a demand for payment.
- b. Stipulated penalties are due and payable within fourteen (14) days of Settling Defendants' receipt from EPA of a demand for payment of the penalties. All payments under this Paragraph shall be paid by certified check made payable to "EPA Hazardous Substance Superfund," and referencing "Lowry Landfill Site-- Stipulated Penalties," EPA-Region VIII, Site/Spill ID # 08-08, and DOJ case number 90-11-3-06703. Settling Defendants shall forward the certified check(s)

to Mellon Bank, EPA-Region VIII, Attn.: Superfund Accounting, Post Office Box 360859M, Pittsburgh, PA 15251, or any other such address as EPA may designate in writing. Copies of check(s) paid pursuant to this Paragraph, and any accompanying transmittal letter(s), shall be sent to EPA as provided in Section X of this Consent Decree (Notices and Submissions).

20. Payments made under Paragraphs 15 and 19 shall be in addition to any other remedies or sanctions available to the United States by virtue of Settling Defendants' failure to make timely payments required by this Consent Decree, provided, however, that Settling Defendants are entitled to a credit against any penalties which are awarded pursuant to this Paragraph in the amount of any stipulated penalties paid by Settling Defendants for the same violation.

21. If the United States must bring an action to collect any payment required by this Consent Decree, and prevails in such action, Settling Defendants shall reimburse the United States for all costs of such action, including but not limited to, attorneys fees.

#### **VIII. COVENANT NOT TO SUE BY PLAINTIFF**

22. This Consent Decree constitutes a settlement by the United States, on behalf of EPA, for the United States' claims for the alleged violations listed in the Notice of Violations and described in the Complaint. The Settling Defendants shall not use their compliance with this Consent Decree as a defense to any future action(s) brought by the United States pursuant to any federal law or regulation. This covenant not to sue extends only to the Settling Defendants and does not extend to any other person. This covenant not to sue shall take effect upon receipt by

the United States of all payments required by Section VI of this Consent Decree (Payment of Civil Penalty).

23. The covenant not to sue set forth in Paragraph 22 does not pertain to any matters other than those expressly specified therein. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendants with respect to all other matters. Nothing in this Consent Decree shall be construed to impact or alter in any way the Plaintiff's claims and defenses in Civil Action No. 02-N-1341. Except as provided in the preceding Paragraph, nothing contained herein shall in any way limit or restrict the response and enforcement authority of the United States to initiate appropriate action, either judicial or administrative, under Sections 104, 106, and 107 of CERCLA, 42 U.S.C. §§ 9604, 9606, and 9607, or any other provision of law, against Settling Defendants or against any other person or entity not a party to this Decree.

24. This Consent Decree shall not relieve Settling Defendants of their obligation to comply with all applicable provisions of federal, state, or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit.

25. Except as set forth in Paragraph 22, nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States to seek any other remedies or sanctions available by virtue of Settling Defendants' violation of this Consent Decree or of the statute or regulations upon which this Consent Decree is based, or for Settling Defendants' violation of any applicable provision of law.

26. Nothing in this Consent Decree shall be construed to create any rights in, or grant

any cause of action to, any person not a Party to this Decree. The Parties expressly reserve any and all rights, remedies, defenses, claims, demands, and causes of action which each of them may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

**Specific Reservations.**

27. The covenant not to sue set forth in Paragraph 22, above, does not apply, among other things, to the following:

- a. claims based upon failure of Settling Defendants to meet the requirements of this Consent Decree;
- b. claims for damages to natural resources, as defined in Section 101(6) of CERCLA, 42 U.S.C. § 9601(6);
- c. claims for costs incurred by any natural resources trustees;
- d. claims based upon criminal liability; and
- e. claims for response costs incurred by any federal agency.

**IX. COVENANTS BY SETTling DEFENDANTS**

28. Subject to the rights reserved by Defendants in Paragraph 29, Settling Defendants covenant not to sue or assert any claims or causes of action against the United States relating to the violations alleged in the Notice of Violations and described in the Complaint.

29. Except for the covenant not to sue relating to the Notice of Violations and the Complaint, set forth in Paragraph 28, Settling Defendants expressly and specifically reserve any and all rights, claims and defenses they may have now or in the future with respect to any actions

concerning the Site. Except for the covenant not to sue relating to the Notice of Violations and the Complaint, set forth in Paragraph 28, nothing in this Consent Decree or in the filing of the Complaint shall constitute a waiver of, or otherwise alter in any way any right of the Settling Defendants to challenge any removal or remedial action, or any decision or obligation imposed upon the Settling Defendants by the United States in the ROD, the RD/RA, the UAO or otherwise relating to the Site. Nothing in this Consent Decree shall be construed to impact, or alter in any way, the Settling Defendants' affirmative defenses and counterclaims in *United States v. City and County of Denver et al.*, Civ. No. 02-N-1341 (D. Colo. filed July 15, 2002). Nothing in the Consent Decree, nor the filing of the Complaint in this action, shall operate or be construed to limit the time for review of response actions at the Site, or impair or in any way adversely affect Settling Defendants' reserved rights, claims and defenses or prejudice their right to assert them.

30. The Parties agree that for the purposes of any penalty assessment for any future violation of the UAO, this Consent Decree shall not be considered an adjudication of any claims alleged in Plaintiff's complaint.

#### **X. NOTICES AND SUBMISSIONS**

31. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute

complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, and Settling Defendants, respectively.

**As to the United States:**

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, DC 20044

**As to EPA:**

Jessie Goldfarb (8ENF-L)  
Senior Enforcement Attorney  
U.S. Environmental Protection  
Agency-Region VIII  
999 18th Street, Suite 300  
Denver, CO 80202

Regional Financial Management Officer  
U.S. Environmental Protection  
Agency-Region VIII  
999 18th Street, Suite 300  
Denver, CO 80202

**As to Settling Defendants:**

Nancy J. Severson, Manager  
Department of Environment & Health  
City and County of Denver  
201 West Colfax Street - Dept. 1009  
Denver, CO 80202

Cole Finegan  
City Attorney  
City and County of Denver  
Department of Law  
201 West Colfax Street - Dept. 1207  
Denver, CO 80202

Steven D. Richtel  
Waste Management, Inc.  
8310 South Valley Hwy., Suite 200  
Englewood, CO 80112

#### **XI. RETENTION OF JURISDICTION**

32. This Court shall retain jurisdiction of this matter for the purpose of enforcing the terms of this Consent Decree.

#### **XII. LODGING; OPPORTUNITY FOR PUBLIC COMMENT**

33. This Consent Decree shall be lodged with the Court for a period of thirty (30) days for public notice and comment.

34. The United States expressly reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

35. If for any reason this Court should decline to approve this Consent Decree in the form presented this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

#### **XIII. SIGNATORIES/SERVICE**

36. The undersigned representatives of Settling Defendants and the Assistant Attorney General of the United States certify that they each are fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

37. Settling Defendants waive service of the Complaint and summons under Fed. R. Civ. P 4.

38. Settling Defendants shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on their behalf with respect to all matters arising under or relating to this Consent Decree.

SO ORDERED THIS \_\_\_\_ DAY OF \_\_\_\_\_, 2004.

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE



THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States of America v. The City and County of Denver, Waste Management of Colorado, Inc., and Chemical Waste Management, Inc., Civil Action No. \_\_\_\_\_, relating to the Lowry Landfill Superfund Site.

**FOR THE UNITED STATES OF AMERICA**

Respectfully submitted.

THOMAS L. SANSONETTI  
Assistant Attorney General

Date: 5/9/04

W. BENJAMIN FISHEROW  
Deputy Chief  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Ben Franklin Station  
Washington, D.C. 20530

Date: 5/17/04

JOHN N. MOSCATO  
Trial Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
999 18<sup>th</sup> Street, Suite 945 N  
Denver, CO 80202

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States of America v. The City and County of Denver, Waste Management of Colorado, Inc., and Chemical Waste Management, Inc., Civil Action No. \_\_\_\_\_, relating to the Lowry Landfill Superfund Site.

**FOR EPA**

Date: May 16, 2004

\_\_\_\_\_  
SHARON KERCHER

Director, Technical Enforcement Program  
Office of Enforcement, Compliance, and  
Environmental Justice  
U.S. Environmental Protection Agency-  
Region 8  
999 18th Street, Suite 300  
Denver, CO 80202

Date: 5/17/04

\_\_\_\_\_  
MICHAEL T. RISNER

Director, Legal Enforcement Program  
Office of Enforcement, Compliance, and  
Environmental Justice  
U.S. Environmental Protection Agency-  
Region 8  
999 18th Street, Suite 300  
Denver, CO 80202

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States of America v. The City and County of Denver, Waste Management of Colorado, Inc., and Chemical Waste Management, Inc., Civil Action No. \_\_\_\_\_, relating to the Lowry Landfill Superfund Site.

**FOR SETTLING DEFENDANTS**

**BINGHAM MCCUTCHEN LLP**

by \_\_\_\_\_  
**JAMES J. DRAGNA, ESQ.\***  
Attorneys for Defendant  
**BINGHAM MCCUTCHEN LLP**  
355 South Grand Avenue, Suite 4400  
Los Angeles, CA 90071-3106  
\*Admitted under Local Rule 83.3

**FOR SETTLING DEFENDANT  
CITY AND COUNTY OF DENVER**

**COLE FINEGAN**  
Attorney for the City and County of Denver

by \_\_\_\_\_  
**ARLENE V. DYKSTRA**  
Assistant City Attorney  
City and County of Denver  
Department of Law  
201 West Colfax Street - Dept. 1207  
Denver, CO 80202

by \_\_\_\_\_  
**NANCY J. SEVERSON**  
Manager of Environment & Health City  
and County of Denver  
201 West Colfax Street - Dept. 1009  
Denver, CO 80202

Agent Authorized to Accept Service on Behalf of Above-Signed Defendant:

Name: T. Shaun Sullivan  
Title: Assistant City Attorney  
Address: City and County of Denver  
Department of Law  
201 West Colfax Street - Dept. 1207  
Denver, CO 80202

**FOR SETTLING DEFENDANTS  
WASTE MANAGEMENT OF COLORADO,  
INC. and CHEMICAL WASTE  
MANAGEMENT, INC.**

Date: April 29, 2004  
STEVEN D. RICHEL  
Director, Closed Sites  
Waste Management, Inc.  
8310 South Valley Hwy., Suite 200  
Englewood, CO 80112

Agent Authorized to Accept Service on Behalf of Above-Signed Settling Defendants:

Steven M. Morgan  
Vice President and Assistant General Counsel  
Waste Management, Inc.  
1001 Fannin, Suite 4000  
Houston, Texas 77002